Filed 1/28/10 Century National Ins. v. Super. Ct. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CENTURY-NATIONAL INSURANCE COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

DEBBIE BENJAMIN,

Real Party in Interest.

E049497

(Super.Ct.No. RIC502875)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Gary B. Tranbarger, Judge. Petition granted in part; denied in part.

Haight Brown & Bonesteel, Valerie A. Moore and Eugenie Gifford Baumann for Petitioner.

No appearance for Respondent.

John V. Gaule for Real Party in Interest.

In this matter we have reviewed the petition and the opposition thereto, which we conclude adequately address the issues raised by the petition. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

FACTUAL AND PROCEDURAL BACKGROUND

Real party in interest Debbie Benjamin (Benjamin) had a homeowners policy with petitioner Century-National Insurance (Century). She made two claims for water damage. The first claim was from a broken pipe on April 7, 2006; the second claim arose on January 17, 2008.

With respect to the first claim, Benjamin reported water damage consisting of flooding in the garage, driveway, and other areas of the home, had occurred on April 7, 2006.

An adjuster inspected the property and concluded that the damage was the result of a pipe leak underneath the home's slab. On May 8, 2006, Century issued a check to Benjamin in the amount of $3,924.38 for damage to the real property.

On July 18, 2006, Benjamin faxed to Century a list of personal property items damaged by the water leak. Century was concerned about this claim because it believed that Benjamin was unable to describe some items and had no receipts for recently purchased items. Moreover, the first adjuster had not seen these items in the garage during her inspection. Because of these concerns, Century requested Benjamin provide a recorded statement. Eventually, Benjamin did give a recorded statement on December 20, 2006.

Century believed that Benjamin gave evasive and shifting answers to many questions. Accordingly, it referred the case file to its attorneys who then attempted to have Benjamin and her adult children provide examination under oath (EUO) as required under the terms of her policy. Century's counsel wrote Benjamin seven times between February 23, 2007, and June 1, 2007, to request she schedule an examination. Benjamin did not respond to most of these requests, but on April 14, 2007, she sent a "Sworn Statement in Proof of Loss" in which she claimed a loss of $42,252.74, and a supplemental claim of $76,300. Century's counsel replied, acknowledging receipt of the statement but stating that the EUOs were still required.

Finally on July 3, 2007, Century's counsel wrote Benjamin to inform her that her claim was being denied due to her failure to schedule the EUOs.

On January 18, 2008, Benjamin reported another water loss had occurred at her home the previous day. She submitted dry cleaning claims in the sum of $1,650 and for dry-out services of $2,850. An adjuster conducted an inspection of the home on February 15, 2008. He concluded that there was evidence of some water damage around the sliding glass door in the master bedroom from surface water, but no leaks in the plumbing. Benjamin told the adjuster that both toilets had overflowed at the same time. She did not provide a recorded statement, although it is disputed whether she was ever asked to give one.

On May 8, 2008, Century issued Benjamin a check for $1,500.04, which represented the amount of damages due to a short term water leak.

On May 27, 2008, Benjamin faxed Century a typewritten note indicating that she was making a claim for damaged personal property located in her master bedroom totaling $15,000, as well as $1,600 in additional dry cleaning expenses.

Again, Century was suspicious and requested she submit to EUO. It made these requests on July 24, August 4, and August 20, 2008, but received no response. On September 24, 2008, Century wrote to Benjamin denying her claim due to her failure to cooperate.

Benjamin filed suit for breach of contract and bad faith on July 2, 2008. Century then moved for summary judgment/adjudication based on her failure to comply with a condition precedent, i.e., her failure to schedule EUO—a prerequisite to receiving benefits under the policy.

In a declaration in opposition, Benjamin asserted that with respect to the 2006 claim, she called Century's attorney to schedule the EUO but then had to cancel and reschedule a few times due to illness of her youngest child and herself. She does not specify when this was or how many times she cancelled. She claims that when she later called to schedule the EUO she was informed it was too late and the case had been closed. With respect to the 2008 claim, she denies receiving any of the letters requesting EUO. She adds that she filed this lawsuit on July 2, 2008, prior to Century's decision to have her provide EUO.

The trial court granted summary adjudication in favor of Century with respect to the bad faith claim, noting that it was undisputed that it had made the requests for EUOs. It denied summary adjudication of the breach of contract cause of action on the ground that

there was a triable issue of fact whether Benjamin's failure to submit to an examination was willful.

DISCUSSION

"An insured's compliance with a policy requirement to submit to an examination under oath is a prerequisite to the right to receive benefits under the policy." (*Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th 578, 587 (*Brizuela*).) The general rule is that, *in the absence of a reasonable excuse*, an insured's failure to comply with the insurance policy provisions requiring EUO results in the forfeiture of coverage.

A reasonable excuse for failure to comply does not result in forfeiture, although the California cases do not talk in terms of a willful failure. (*Brizuela*, *supra*, 116 Cal.App.4th at p. 595.) This would seem to be a distinction without a difference. In *Brizuela*, the insured owner of business property made a claim for fire damage. He sued for breach of contract and bad faith when the insurer denied the claim based on his failure to submit to EUO. The undisputed evidence showed that the insurer requested such an examination; the insured requested a copy of his recorded statements and the insurer refused. The appellate court held that the insurer was entitled to summary judgment. "Brizuela's failure, six months after CalFarm's initial request for the examination, to propose any dates for an examination, to respond in a timely manner to CalFarm's proposed dates, and to submit to an examination constituted a refusal to submit to examination under oath." (*Id.* at p. 589.)

In that case, the court rejected Brizuela's argument that dismissal of his action was improper because his failure to appear for examination was not willful. It noted that "[u]nder New York law, summary judgment dismissing an insured's complaint because of

the insured's failure to submit to examination under oath has been held to be inappropriate without affording the insured a last opportunity to comply, unless the insured's failure to appear was willful. [Citations.] There is no California authority allowing such an opportunity. *Even if the standard prescribed by New York law were applicable, Brizuela's conduct here could properly be deemed willful.* When the insured's failure to fulfill his obligations under an insurance policy ' "is indicative of a pattern of non-co-operation [*sic*] for which no reasonable excuse for noncompliance has been proffered," [citation] his conduct is properly deemed willful.' [Citation.] Brizuela's persistent failure to provide CalFarm with available dates for the examination under oath evidences a pattern of noncooperation." (*Brizuela*, *supra*, 116 Cal.App.4th at p 595, italics added, fn. omitted.)

Similarly, here, the trial court should have concluded that Benjamin did not have a reasonable excuse for failing to submit to EUO as to the April 2006 claim. Her declaration acknowledges that she received notice in February 2007 to schedule the EUO and does not deny the subsequent requests. She claims she called the attorney to schedule the EUO but then had to cancel and reschedule a few times due to illness of her youngest child and herself. She does not specify when this was or how many times she cancelled. She claims that when she later called to schedule the EUO she was informed it was too late and the case had been called. However, the uncontested facts show that Century made seven requests over the course of six months and Benjamin never appeared. Her vague claims of illness without any specification of the nature of these illnesses or the dates when she was forced to cancel is not sufficient to raise a triable issue of fact. Rather, the record reveals she engaged

in a pattern of noncooperation for which no reasonable excuse for noncompliance has been proffered.

With respect to the January 2008 claim, Benjamin declares that she never received notice of a request for EUO. If the trier of fact credits this representation, her failure to receive the requests would constitute a reasonable excuse for failing to provide EUO. Thus, we must conclude that Benjamin raised a triable issue of fact with respect to the January 2008 claim.

We reject Benjamin's contention that Century waived any right to demand EUO as a condition precedent because it paid for losses to her home without making such a demand. The claims for damages to her home and damages to personal property were made separately and under different circumstances. The damages to the home were confirmed by an on-site inspection. In contrast, the claims for personal property losses were not confirmed by the adjuster's inspection or by other records Benjamin provided. Century's concerns about the personal property claims were not unreasonable, and it could properly invoke its right for the EUO procedure in an attempt to resolve the concerns. Thus, payment of benefits for a confirmed loss can in no way be construed to be a waiver of Century's right to demand EUO with respect to the claim for personal property losses.

Finally, we note that Benjamin's breach of contract cause of action is based on the failure to pay the April 2006 and January 2008 claims. For purposes of a motion for summary adjudication, separate wrongful acts are considered separate causes of action, whether they are pleaded within the same cause of action or not. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854.) Thus, even though Benjamin pleaded

her claims for April 2006 and January 2008 within the same cause of action, they can be considered separate causes of action for breach and summary adjudication granted as to the 2006 matter. As discussed, she did raise a triable issue as to the 2008 claim by denying she ever received notice of a request for EUO, but the evidence shows a pattern of noncooperation with respect to the demand for a EUO on the April 2006 claim.

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of Riverside County to set aside its order to the extent it denies summary adjudication of the first cause of action for breach of contract and to issue a new and different order granting summary adjudication in part as to Benjamin's April 2006 claim.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioner is awarded its costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.